of *Escobedo*, the Court specifically approves the rejection of the absolute rule sought by *Crooker*:

> "That 'every state denial of a request to contact counsel [is] an infringement of the constitutional right *without regard to the circumstances of the case*'." *Id*, at 491. (Emphasis in *Crooker*).

The continued rejection of the absolute rule sought by *Crooker*, implying as it does that in some cases a state could even deny a request without denying an accused his constitutional right to counsel, clearly rejects, *a fortiori*, the absolute rule sought by petitioner.

This result is also pointed to by the inclusion and emphasis of the request for counsel as a vital factor in *Escobedo* while not even including a reference to this Court's recent reemphasis of the unimportance of a request for counsel in the implementation of the absolute right to be provided counsel in *Carnley v. Cochran, supra*, 369 U.S. 506. The ommission of reference to *Carnley* must be considered to have been by design and not accident. Thus the scope of the rule, and the force of its emphasis, must be and is different.

The decision in *Escobedo* announces an exclusionary rule directed against the affirmative conduct of police and prosecutors calculated to deny to an accused his right to counsel. Any incriminating statements received thereafter, regardless of the fact that they are clearly the product of the free and uncoerced will of the accused, are inadmissible, *Escobedo v. Illinois, supra*, 378 U.S. at 491. The decision in *Massiah v. United States, supra*, 377 U. S. 201, although involving a fed-

eral prosecution, certainly reinforces this view of the *Escobedo* doctrine, particularly the last two paragraphs thereof.[37]

The rule announced is a parallel to that announced in *Mapp v. Ohio,* 367 U.S. 643 (1961), designed as a specific deterrent to police activity calculated to render meaningless the citizen's rights under the search and seizure provision of the Fourth Amendment to the Federal Constitution. It must also be applied with the same practical, non-technical, common sense approach as is the *Mapp* exclusionary rule. *United States v. Ventresca,* 380 U.S. 102 (1965).

A contrary application would result in attempting to make police officers part-time defense counsel and part-time magistrates, or deprive them completely of an investigative technique which, in its proper use and

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[37] "The Solicitor General, in his brief and oral argument, has strenuously contended that the federal law enforcement agents had the right, if not indeed the duty, to continue their investigation of the petitioner and his alleged criminal associates even though the petitioner had been indicted. He points out that the Government was continuing its investigation in order to uncover not only the source of narcotics found on the S.S. Santa Maria, but also their intended buyer. He says that the quantity of narcotics involved was such as to suggest that the petitioner was part of a large and well-organized ring, and indeed that the continuing investigation confirmed this suspicion, since it resulted in criminal charges against many defendants. Under these circumstances the Solicitor General concludes that the government agents were completely 'justified in making use of Colson's cooperation by having Colson continue his normal associations and by surveilling them.'

"We may accept and, at least for present purposes, completely approve all that this argument implies, Fourth Amendment problems to one side. We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against **him** at his trial." **Massiah v. United States,** 377 U.S. at pages 206 and 207. (Emphasis in original).

application, is as invaluable as any modern, scientific tool for the detection and prevention of crime.

The legal scholars and commentators have produced volumes of material on *Escobedo.*[38] It ranges the complete spectrum, from law professors and lawyers[39] to second and third year law students.[40] Both poles of the controversy are forcefully presented, including extensive citations to both primary and secondary authority, in the very recent publication of the University Press of Virginia: Kamisar, Inbau, and Arnold, *Criminal Justice in Our Time,* (Magna Carta Essays, Howard ed. 1965).

Ultimately, however, neither the overwhelming weight of the writings of the commentators, nor the weight of the decisions of the Judges and Justices of the other appellate tribunals of our land, whether state or federal, can dictate or necessarily foreshadow this Court's determination of the scope and effect of the principles announced in *Escobedo.*

If the rule sought by petitioner is forthcoming, we can only re-echo the ominous warnings and misgivings of the dissenters in *Massiah* and *Escobedo, supra.* Miranda and Escobedo are not equal and there is no Con-

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[38] For an exhaustive collection of citations see: Sokol, **Brief of Amicus Curiae in the Escobedo Cases, supra,** n. 29.

[39] E.g. Sutherland, **Crime and Confession,** 79 Harv. L. Rev. 21 (1965); Dowling, **Escobedo and Beyond,** 56 J. Crim. L., C.&P.S., 143 (1965); Herman, **The Supreme Court and Restrictions on Police Interrogation,** 25 Ohio St. L.J. 449 (1964).

[40] E.g. Comment, **Escobedo v. Illinois,** 25 Md. L. Rev. 165 (1965); Comment, **Right to Counsel During Police Interrogation, The Aftermath of Escobedo,** 53 Calif. L. Rev. 337 (1965); Note, **Escobedo in the courts, May Anything You Say Be Held Against You,** 19 Rutgers L. Rev. 111 (1964).

stitutional reason for this Court to equate them in the manner sought by petitioner, any more than there would be for this Court to balance their skill in committing and concealing their crime. No amount of scientific advancements in crime detection will produce evidence which a clever criminal has not been foolish enough to provide for discovery. If a criminal has been clever in the commission of his crime, but is foolish or careless in his handling of the police interrogation of him concerning that crime, the evidence obtained as a result of the only honest investigative avenue left open to the law enforcement agency, should not be suppressed unless that evidence is determined not to be the product of the free and uncoerced will of the accused, or if it is obtained after the police have undertaken a course of conduct calculated to deny the accused his right to counsel. Certainly nothing less will be tolerated, but the United States Constitution requires no more.

CONCLUSION

Quite appropriately, Justice Goldberg, who authored *Escobedo v. Illinois, supra,* provides the words most appropriate to conclude this brief. Speaking for the Court in *United States v. Ventresca, supra,* 380 U.S. 102, he said:

> "This court is alert to invalidate unconstitutional searches and seizures whether with or without a warrant. [Presumably, for purposes of this case, confessions and admissions may be substituted for the final phrase concerning searches and seizures] [Citations omitted.] By doing so, it vindicates individual liberties and strengthens the administration of justice by promoting respect for law and order. This court is equally concerned to uphold the actions of law enforcement officers consistently following the proper constitutional course. This is no less important to the administration of justice than the invalidation of convictions because of disregard of individual rights or official overreaching. In our view the officers in this case did what the Constitution requires.
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> * * *
>
> *"It is vital that having done so their actions should be sustained under a system of justice responsive both to the needs of individual liberty and to the rights of the community." Id,* at 111 and 112. (Emphasis added).

The officers in this case also acted within the constitutional standards, and it is equally vital that their actions be sustained.

The judgment and decision of the Arizona Supreme Court in this case below should be affirmed.

Respectfully submitted,

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February, 1966

APPENDIX A

JAMES M. KILGORE, JR., M.D.
Suite 209
461 West Catalina Drive
Phoenix 13, Arizona

PSYCHIATRY

May 28, 1963

Honorable Warren L. McCarthy
Judge of the Superior Court
Maricopa County
Court House
Phoenix, Arizona

MIRANDE, Ernest Arthur
Criminal Cause #41947, #41948

Ernest Arthur Mirande is a 23-year-old Mexican male who was examined by me in the County Jail on May 26, 1963.

Mr. Mirande is charged with the offense of robbery in relation to one Barbara Sue McDaniel on November 27, 1962. Mr. Mirande states that on that evening approximately 9:30 p.m. he saw a lady go to her car in the parking lot alone. He approached the car and got in the front seat. He stated at the time that he didn't know whether he would rob or rape the lady. She asked him if he didn't want to go to her apartment. Mr. Mirande stated that this frightened him in that she was so eager for sex and decided at that point to ask for money which she readily gave to him. He then said, "Don't worry. If I had wanted to rape you, I would have done it before."

cooperation. Asked her to lay down and she did could not get penis into vagina got about ½ (half) inch in. Told her to get clothes back on. Drove her home. I couldn't say I was sorry for what I had done. But asked her to say a prayer for me. E.A.M.

I have read and understand the foregoing statement and hereby swear to its truthfulness.

/s/ Ernest A. Miranda

WITNESS /s/ Carroll Cooley

Wilfred M. Young #182